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# A Crossroad in Louisiana History

John T. Hood Jr.

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# SYMPOSIUM: LOUISIANA AND THE CIVIL LAW

## A Crossroad in Louisiana History

*John T. Hood, Jr.\**

In all of the colorful history of Louisiana, perhaps the most interesting and important period was the quarter century which immediately followed the acquisition of the Louisiana Territory by the United States. During that period a number of crises were faced by the inhabitants and decisions of tremendous importance were made.

Of all the problems presented and decisions made during that period, however, the most significant and far reaching, I think, related to the issue of what system of law should be adopted to govern the newly acquired province. Should it be the English common law system, which had been adopted and was in effect in all of the states which previously had been admitted to the union, or should it be the civil law system, with its Roman, Spanish, and French background, which had governed the people in that area for three or four generations immediately prior to the Louisiana Purchase?

It was necessary that some system of laws be adopted after the transfer was completed, and there were actually only two alternatives — the civil law or the common law. The decision as to which of the two systems should be put into effect, however, was one which was destined to affect every individual of all generations of Louisianians from that time forward. Louisiana had reached one of its first important crossroads in its development, and it was necessary for her inhabitants to elect which route they were to pursue.

Many of you, I understand, have just begun your legal studies, so I thought a discussion of this "Crossroad in Louisiana History" might be of interest to you.

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\*Judge, Louisiana Court of Appeal, Third Circuit. This paper was delivered by Judge Hood to the student body of the Louisiana State University Law School on October 17, 1961.

The old Roman law ended, and civil law, as we now know it, had its beginning in the sixth century A.D. with Justinian's "Corpus Juris." This body of laws consisted of Justinian's Institutes, the Digest, the Codex, the Novellae Constitutions, and a string of Justinian's own enactments.

Spain and the lower part of France, both lying close to Rome, had fallen early into imperial arms, and the civil law was introduced and soon attained an impregnable position in both of those countries. In the course of years a number of Spanish codes were compiled and adopted, some of them attempting to shake off the Roman law, and others utilizing it with the Justinian body of laws. The Roman civil law also infiltrated lower France at first, and then all of France, beginning particularly in the 12th and 13th centuries, and continuing until the adoption of the Code Napoleon in 1804. An English jurist, in fact, wrote in 1650 that "Roman legal science, if it should perish in every other country, could be entirely reconstructed from French learning only." So, by the time the 18th and 19th centuries rolled around, civil law systems, based substantially on Roman law, had been established in both Spain and France.

The legal history of the area now included in the State of Louisiana actually began in 1712, when Louis XIV of France gave Antoine Crozat a charter to Louisiana. Prior to that time there was little need for a system of laws in this large, sparsely settled area, and none really existed. Crozat's charter provided that the laws for this colony were to be Edicts, Ordinances, and the Custom of Paris.

The Custom of Paris was a collection or code of laws, which had been compiled in the fifteen hundreds, to govern the area around the City of Paris. There were about 60 other customs, or codes, in France at that time, each bearing the name of the district to which it applied, but the Custom of Paris was predominant, perhaps because Paris was the capital of the kingdom, and its parliament had great influence on the other parliaments.

After five years, Crozat surrendered his charter, and another was awarded to John Law's Company of the West, with the same French laws continuing in force. The Company of the West surrendered its charter in 1731, and thereafter Louisiana became a crown colony, still governed by the same French laws, until it was ceded to Spain by the Treaty of Paris signed in 1763.

When a region is ceded, however, the local law continues in force until abrogated by the new owner. And Spain did not get around to instituting Spanish law in the ceded territory until six years after the treaty had been signed. The French laws governed Louisiana, therefore, for 57 years, from 1712 to 1769.

In 1769, however, the newly appointed Spanish Governor, Don Alexander O'Reilly, issued a proclamation which abrogated all French law (with the exception of the "Black Code"), and instituted the Spanish law in its place. The "Black Code," or the "Code Noir," was a system of laws established by Louis XIV pertaining solely to the ownership, discipline, and control of slaves. It was in effect in Louisiana prior to Spanish dominion, it was retained by the Spanish, was adopted by the legislature after the Louisiana Purchase, and remained in effect until the Civil War.<sup>1</sup> Except for the French Code Noir, however, the French law was totally overthrown by the Spanish in 1769, and its influence was not renewed until three or four decades later, when the redactors of the first Louisiana Civil Code went to the French Code for a model.

The Spanish Governor, O'Reilly, was actually a young Irishman, of great military ability, who had forsaken his own country and had risen to distinction in the Spanish Army. He organized an efficient government for the province, and because of his military inclinations, his organizational ability and his aggressiveness, the substitution of Spanish law for the province was thoroughly carried out.

On the day Spanish law was instituted O'Reilly published a digest of instructions as to the manner of filing suits and rendering judgments, based on Spanish laws. This digest, which is sometimes called O'Reilly's Code, was actually a brief Code of Practice, and some of its provisions were later incorporated into our own procedural laws.

On October 1, 1800, by the Treaty of San Idelfonso, Spain ceded Louisiana back to France, but France did not assume actual sovereignty until November 30, 1803, and then only for a period of twenty days. During that twenty-day period, Laussat, representing Napoleon, was in control as Colonial Prefect. Laussat, who had arrived in Louisiana several months before that time, was disappointed almost from the start by the news

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1. WALLACH, *RESEARCH IN LOUISIANA LAW* 166 (1958).

that the province had been sold to the United States. He felt that he had not been treated well by the Spaniards, and he knew that his power would be short lived, so he took great pleasure in kicking the Spanish officials out while he could. On the day he assumed command he abolished the Cabildo and created a municipal government for Louisiana. He organized a militia, composed of Americans and Creoles, and made himself as obnoxious as he could to his unwilling hosts. He did not have time to organize a judiciary or to reinstate French laws, however, so by virtue of the rule which I have already mentioned, the Spanish law remained in force until the day the United States took possession on December 20, 1803.

The 1803 Act of Congress, which authorized the President to take possession of the province, provided for the appointment of commissioners to administer the laws.<sup>2</sup> Pursuant to that Act, President Jefferson appointed W. C. C. Claiborne as one of these commissioners, and vested him with almost dictatorial powers. The first official act of Claiborne was to provide for the retention of the "laws then in force," which, of course, were the Spanish laws. He intended for this to be only a temporary measure, with the thought that a more permanent system would be put into effect later.

Claiborne, feeling that he needed to defend or to justify his action in establishing Spanish law, wrote to the Secretary of State shortly thereafter this message:

"I am charged," he said, "with making unfortunate innovations on the Spanish System of jurisprudence and with much of the confusion which ensued. On my arrival in Louisiana I found a disorganized government and a dissatisfied people. The Colonial Prefect had abolished all of the former Spanish Tribunals. In lieu of the Cabildo I found a municipality organized upon French principles. . . . The seals were put upon the different judicial offices and no regular judiciary was in existence.

"I determined, therefore, to recognize the authorities and the laws as I found them and to make such further arrangements for the good of the province as might hereafter sug-

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2. An Act to enable the President of the United States to take possession of the territories ceded by France, 2 Stat. 245 (1802), 9 U.S. DEPARTMENT OF STATE, THE TERRITORIAL PAPERS OF THE UNITED STATES 89 (Comp. and ed. by Carter, 1940).

gest themselves to my own mind, or might be suggested by others and which my own judgment should approve."<sup>3</sup>

The Spanish laws which governed the province at that time were voluminous, consisting of at least six different codes and more than 20,000 laws.<sup>4</sup> In addition thereto the United States Constitution and several Acts of Congress also had to be reckoned with. To add to the confusion, there was a great diversity of opinion, even in Spain, as to which of these Spanish codes should prevail in case of conflict. Worse than this, copies of these Spanish codes were extremely rare, and a complete collection of them did not exist anywhere in the province. Governor Claiborne, in writing to President Jefferson, commented that even he had not been able to obtain a copy of O'Reilly's Code.<sup>5</sup> Of some of these codes, not a single copy existed. Yet, all of these codes, old or new, rare or plentiful, were still as potent rules of conduct as were the most recent proclamations.

Some of the Spanish laws were impractical and were repugnant to citizens of the United States. For example, serious penalties were imposed upon the unsuccessful defendant in a civil suit. If an injured party afterwards sat with the wrongdoer, the right to reparation was lost. The lawyer who intentionally cited the law falsely was barred from the territory and all of his property was confiscated. Torture was legally sanctioned to force out testimony as to accomplices and to extract the truth from prevaricating witnesses. Many offenses were made punishable by capital punishment, and the punishment was accomplished by burning, by hanging, by wild beasts or by decapitation by the sword. The law humanely provided, however, that decapitation could not be accomplished by the saw or by the reaping hook.<sup>6</sup>

Shortly before the new province was surrendered, President Jefferson and Governor Claiborne were advised by the Spanish officials that they might have some trouble with the inhabitants. They said that "the people of this Country are an assemblage of all nations, most of whom have no idea of a good government,

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3. Dart, *Sources of the Louisiana Civil Code*, published in SAUNDERS, LECTURES ON THE CIVIL CODE OF LOUISIANA 24 (1925).

4. Tucker, *The Code and the Common Law in Louisiana*, 29 TUL. L. REV. 739, 743 (1955).

5. Brown, *Law and Government in the "Louisiana Purchase": 1803-1804*, 2 WAYNE L. REV. 169, 182 (1956).

6. Wigmore, *Louisiana: The Story of its Legal System*, 1 SO. L.Q. 1 (1916).

are only kept in order by the Hand of Power, are excessively ignorant and may easily be imposed upon, therefore there will be the greatest necessity of being prepared for any event whatever." With this information, Claiborne and Jefferson anticipated, first, that force would be necessary to compel the inhabitants to yield to United States authority, and, second, that once this authority had been established it would be an easy matter to institute the system of laws which they felt were advisable. They were wrong in both of these conclusions. The transfer of authority was effected peacefully and without incident, but the President and the Governor virtually stepped on a hornets' nest when they attempted to establish the English common law as the legal system for this territory.

Just prior to the acquisition of this territory by the United States, the President propounded questionnaires to Governor Claiborne and to Daniel Clark, a wealthy and prominent citizen of New Orleans, seeking information about this newly acquired area. In response to these questionnaires Claiborne replied that at that time there were no lawyers in the territory, according to the "usage" in the United States, but that litigation gives bread to about thirty persons in the entire territory.<sup>7</sup> Clark answered that "the number of lawyers is trifling, not exceeding 3 or 4 attorneys, and their standing in society is full as good as their character or talents will justify."<sup>8</sup> Though not pertinent to the subject we are discussing, it was also interesting to me to note that, according to Clark, the fees of judges were 25¢ for a half signature, 50¢ for a whole signature, and \$2.75 for hearing evidence or attending a sale.<sup>9</sup>

Although there were very few lawyers in Louisiana at the time those questionnaires were answered, the formal delivery of Louisiana to the United States caused a host of immigrants, both American and foreign-born, to flock to New Orleans — all intent on making a fortune. Among them were a number of lawyers, most of whom were of common law origin. Fortunately for the future of this state, however, the lawyers who located here during those early days, with few exceptions, were men of high integrity and remarkable ability. Dean Wigmore, in writing of

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7. 9 U.S. DEPARTMENT OF STATE, *THE TERRITORIAL PAPERS OF THE UNITED STATES* 16 (Comp. and ed. by Carter, 1940).

8. *Id.* at 28.

9. *Ibid.*

developments in Louisiana during the next twenty years, put it this way:

"But this period was the Augustan age of the bar of Louisiana. The breadth of research which the circumstances forced upon them tended to make and did make jurists of them all. During those twenty years the lawyers drew for their authority upon the Gothic, Spanish, and French codes, the Roman and the civil laws, with their attendant cloud of commentators, and, finally, upon the common law of England and its developed form in this country. . . . There, first in this country, and there only perhaps it might be added, was found at the bar a taste for comparative law. The names of the brilliant ones of that day are not often heard now, but Hall, Livingston, Derbigny, Duponceau, Brown, Moreau-Lislet, Workman, and Mazureau, were eminent names in the creative era."<sup>10</sup>

Governor Claiborne, himself, was a lawyer — a native of Virginia. Because of his common law background and the fact that the common law system had been adopted in all of the other states, he was convinced that it was to the best interests of the territory that the common law system be instituted here. In that belief he was supported by President Jefferson and by some of the lawyers with common law backgrounds who had immigrated to Louisiana.

Many of the inhabitants of Louisiana, however, already displeased over the arbitrary powers conferred by Congress on the President and his appointees in the territory, became alarmed when they learned that the newly appointed American officials intended to abrogate the laws with which they were familiar, and to institute a new system of laws which were strange to them.

The common law system unquestionably would have been put into effect in Louisiana without delay, were it not for the fact that Edward Livingston, a New York lawyer, who immigrated to Louisiana in 1803, emerged as a leader in opposing this action and as a champion for the cause of retaining a civil law system in the territory.

Livingston was truly a genius. He became internationally known and respected for his statesmanship, his keen intellect and

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10. Wigmore, *Louisiana: The Story of its Legal System*, 1 So. L.Q. 1 (1916).



his profound knowledge and understanding of the law. Much could be said about his life and accomplishments, but instead I will simply quote what Charles Gayarré had to say about Livingston as a scholar and an advocate:

"He was a profound jurist and an accomplished scholar. Which of the two predominated, it would have been difficult to tell. He managed his cases in court with admirable self possession. It was the calm consciousness of strength; it was the serene majesty of intellect. There was no sparring, no wrangling, no browbeating. When he rose to speak, the attention of the judge, jurors, members of the bar and everybody in court was instantly riveted. There were no flashy declamations, no unbecoming carpings, no hair-splitting, no indecorous claptrap, no tinsel ornament, no stage thunder, no flimsy sophistical argumentation, no idle straggling words. His discourse was compact and robust; his language was terse and pure. His eloquence was of the classical order and uniformly elegant. It would in forensic debates, flow at first with the modesty of a gentle stream, but by degrees, swelling and rushing like the mighty tide of the ocean, it would overflow far and wide and leave the opposition not an inch of ground to stand upon."<sup>11</sup>

Although Livingston had a common law background, his study of the Roman law after his arrival in Louisiana convinced him that the civil law system was superior to the common law used in other states. Accordingly, he dedicated himself to the task of seeing that the laws of the new territory which he had adopted as his home would be based on Roman civil law rather than the English common law.

On March 26, 1804, Congress divided the Louisiana Territory into two parts, the portion which is now substantially the State of Louisiana being called the Territory of Orleans.<sup>12</sup> The law provided that the governing body of this territory should be a Legislative Council, consisting of thirteen members appointed by the President. The President, of course, before making these appointments, looked to Governor Claiborne for recommendations, both having the common purpose in mind of finding thirteen ap-

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11. Gayarré, *The New Orleans Bench and Bar in 1823*, in McCaleb, *THE LOUISIANA BOOK* 54, 68 (Straughan ed. 1894).

12. 2 Stat. 283 (1804).

pointees who were favorable to adopting the common law for Louisiana.

Livingston, being aware of this purpose, undertook to prevent the appointment of such a council. Knowing that a great majority of the people were opposed to adopting a new and unfamiliar system of laws,<sup>13</sup> he prepared a memorial urging Congress to grant statehood to the territory at once in order that it might be governed by *elected* representatives, rather than by *appointees*. This memorial was adopted at a public meeting held in New Orleans in October, 1804, and with the help of Daniel Clark it was distributed throughout the territory and was then presented to Congress.<sup>14</sup>

Before Congress had an opportunity to consider the memorial prepared by Livingston, Claiborne managed to find eight men dedicated to the common law system, who were willing to accept appointments as members of the Legislative Council. The Council was then convened, but Livingston succeeded in blocking any action by it tending to establish a system of laws for the territory until his memorial was considered by Congress.

Although statehood was not granted to the territory in response to this memorial, Congress did abolish the Legislative Council early in 1805, and in its stead established as the governing body of the territory a legislature, composed of an *elected* House of Representatives and an *appointed* Legislative Council.<sup>15</sup>

The first legislature met in 1806, and it promptly adopted an act providing that the Territory of Orleans should be governed by the *Roman civil law*, by the *Spanish law*, and by the *ordinances, royal ordinances, and decrees* which had formerly applied to the colony of Louisiana.<sup>16</sup>

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13. Brown, *Legal Systems in Conflict: Orleans Territory 1804-1812*, 1 AM. J. LEGAL HIST. 35, 36 (1957).

14. 9 U.S. DEPARTMENT OF STATE, *THE TERRITORIAL PAPERS OF THE UNITED STATES* 245, 246, 261, 310, 314 (Comp. and ed. by Carter, 1940).

15. Congressional Act of March 2, 1805. This memorial was presented to the House December 3, 1804, and referred to a committee appointed to consider improvements in the Orleans government. A report was made January 25, 1805, denying some of the assertions made by the petitioners, but recommending self-government for the territory. The petition was presented to the Senate December 31, 1804, and referred to a committee January 4, 1805. The bill reported by the committee was passed as the Act approved March 2, 1805.

16. Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana*, 16 TUL. L. REV. 319, 323-26 (1941). See also Brown, *Legal Systems in Conflict: Orleans Territory 1804-1812*, 1 AM. J. LEGAL HIST. 35, 47 (1957).

The adoption of this act, of course, was a complete victory for Livingston and a defeat to Governor Claiborne. Claiborne, however, promptly vetoed the act, assigning as his reasons that he considered it improper and useless, since the laws of Congress determined whether the civil law should or should not be recognized in that territory.<sup>17</sup>

Immediately following the veto of this act, the legislature adjourned in protest, assigning as the reasons for adjournment that "their best Acts were rejected by the Governor."<sup>18</sup> Within a few days after this adjournment there was published in a New Orleans newspaper a document called a "Manifesto," which purported to be a resolution completely dissolving the legislature because of Claiborne's veto. This manifesto was signed by several members of the legislature; it discussed in detail the reasoning behind the passage of the act; and it revealed something of the attitude of legislators toward the two rival legal systems. Livingston is credited with being the author of this manifesto, and here is just a small part of what it said:

"We certainly do not attempt to draw any parallel between the civil law and the common law; but, in short, the wisdom of the civil law is recognized by all Europe; and this law is the one which nineteen-twentieths of the population of Louisiana know and are accustomed to from childhood, of which law they would not see themselves deprived without falling into despair. . . .

"Those are the real reasons which attach us to our old legislation, and not any other political reasons which may falsely be attributed to the good inhabitants of Louisiana; and those are the reasons which could not but lead this Legislature to see to it that so precious a deposit should not be touched by an imprudent hand. . . .

"Such are the principles which determined the Legislature to place, before its act on the formation of the code, a preliminary and declaratory law regarding the laws which were to serve as a basis for that work. . . . Nothing more was lacking to the act than the approval of the Governor in order to give the act the force of law, but such approval was refused. . . .

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17. TERRITORIAL PAPERS 642.

18. BROWN, *Legal Systems in Conflict: Orleans Territory 1804-1812*, 1 AM. J. LEGAL HIST. 35, 48-49 (1957).

"Under these circumstances, the Legislative Council, being strongly persuaded that it could not by any means hope to do good, and that its present condition was only an expense for its fellow-citizens, since the measures which were of the greatest importance for the happiness of the Territory were thus rejected, has in a unanimous and spontaneous movement resolved that the Legislature should be immediately dissolved."<sup>19</sup>

The wide publicity which this manifesto received served to intensify the feeling of the legislature and the citizens that Claiborne's plan to institute a common law system in the territory should be resisted and that the civil laws which heretofore had governed them should be retained.

On June 7, 1806, or within two weeks after Claiborne vetoed the act establishing the Spanish law, the legislature met and adopted a resolution appointing James Brown and Lewis Moreau-Lislet to compile and prepare jointly a civil code for the use of the territory, and this resolution specifically directed them to make the *civil law* by which the territory was then governed the groundwork of said code.<sup>20</sup>

Governor Claiborne apparently accepted defeat at that point, because he approved the resolution.

In compliance with this mandate from the legislature, James Brown and Moreau-Lislet prepared a code of laws for the use of the territory and submitted it to the legislature. The official title which they gave to this work was "Digest of the Civil Laws now in force in the Territory of Orleans, with alterations and amendments adapted to its present system of government." Although they described it as a digest of laws then in force, it actually was a Civil Code, and since that time it has been called the Civil Code of 1808.

Brown and Moreau-Lislet, however, did not base this code of laws on the Spanish laws then in force, as directed by the legislature, but instead they used the newly-adopted French Code, the Code Napoleon, as a model. No satisfactory explanation has ever been given as to why this was done, but it is probable that these two redactors, knowing that both the French and Spanish

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19. TERRITORIAL PAPERS 643, 652, 654.

20. The resolution was approved on June 7, 1806. Laws of the Territory of Orleans of 1806, 214.

codes had many common sources in Roman law, felt that the Code Napoleon could be safely used as a model, without displacing the Spanish law. This theory is supported by the fact that there are many differences in the Code Napoleon and the Louisiana Code of 1808, due largely to the fact that there were incorporated into the Louisiana Code a substantial number of Spanish laws which had not been included in the French Code.

Legal scholars differ on the question of whether the 1808 Civil Code was based on the final draft of the Code Napoleon or on one of its preliminary drafts. Regardless of the French sources which they used, however, the primary significance of the adoption of the Civil Code of 1808 was that it established a civil law system, rather than common law, in the territory.

The Legislature of the Territory of Orleans adopted the Civil Code prepared by Brown and Moreau-Lislet on March 31, 1808, and that date marks the real beginning of Louisiana's present civil law system.

Governor Claiborne approved the act promulgating the Civil Code of 1808, but his letters indicate that he did so with some reluctance.

In a letter to the Secretary of State, for instance, Claiborne wrote that his object had been "to assimilate our system of jurisprudence as much as possible to that of the several states of the union," but that under the circumstances, he "could not do otherwise than to sanction the Code."<sup>21</sup>

In another letter, Claiborne wrote: "The Code will probably be greatly censured by many native Citizens of the United States who reside in the Territory. . . . For myself I am free to declare the pleasure it would give me to see the Laws of Orleans assimilated to those of the states generally, not only from a conviction that such Laws are for the most part wise and just, but the opinion I entertain, that in a Country, where a unity of Government and Interests exists, it is highly desirable to introduce thro'out the same Laws and Customs."<sup>22</sup>

The 1808 Code, of course, was intended to be a codification of, and to supersede, all existing Spanish laws. Accordingly, the

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21. TERRITORIAL PAPERS 802, 803.

22. Letter from Claiborne to Judge J. White, October 11, 1808, in 4 CLAIBORNE PAPERS 225. See also letter from Claiborne to Judge Wyckoff, October 22, 1808, in 1909 Rep. of La. Bar Ass'n 129.

act of the legislature adopting that code specifically provided that all of the ancient civil laws in the territory which were contrary to the dispositions contained in the 1808 Code were abrogated. Shortly thereafter, however, the Supreme Court held that all of the old Spanish laws were still in force, except those parts which were contrary to or incompatible with the provisions of the Louisiana Civil Code.<sup>23</sup> This decision again threw the substantive law of the State of Louisiana into a state of chaos, and that led to a revision of the Louisiana Civil Code, which was accomplished in 1825. The Civil Code of 1825, however, was also modeled after the French Code Napoleon, and it further contained a provision which specifically repealed all of the old Spanish laws, replacing them with the Revised Civil Code. Although the Supreme Court thereafter recognized that some Spanish principles of law which had been established by jurisprudence may still be in effect,<sup>24</sup> the adoption of the 1825 Code to all practical purposes completely superseded the old Spanish law.

The Louisiana Civil Code was revised again in 1870 and, of course, it has been amended on numerous occasions, but it remains today a model code of laws, firmly based on Roman civil law, modeled after the French Code, modified to include the best features of French and Spanish law, enriched by the experiences of at least twenty-seven centuries, and mellowed by American traditions and principles.

Some legal scholars feel that judicial construction has had a tendency to impart common law into our jurisprudence. Others go further and stoutly maintain that Louisiana has abandoned the civil law and has become a common law state. A third school of thought is that civil law has not only been retained in Louisiana, but that common law states are rapidly abandoning common law principles and are embracing the civil law. And then, other eminent scholars have expressed the view that Louisiana can be classified as neither civil law nor common law, but that it has developed a legal system of its own, which should be classified as *sui generis*.

A few years ago a professor in one of our Louisiana law schools wrote an article which was published, wherein he made these statements:

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23. *Cottin v. Cottin*, 5 Mart.(O.S.) 93 (La. 1817).

24. *Flower v. Griffith*, 6 Mart.(N.S.) 89 (La. 1827); *LaCroix v. Coquet*, 5 Mart.(N.S.) 527 (La. 1827).

"In view of the importance and the depth of the cleavage in these divisions under the one system or the other, the time has come for students of the legal system of Louisiana today to demand a new appraisal of the true situation, refusing longer to accept unquestioningly the traditional declarations and disregarding the romantic prejudices of an affectionate predilection, and to judge only from the actual presented facts. Such newly free judgment can result in but one way: it must be admitted that Louisiana is today a common law state."<sup>25</sup>

Shortly thereafter, four of his colleagues, also Louisiana law school professors, authored another article, emphatically disagreeing with his views. In this article they stated:

"The subject of the public and commercial law of Louisiana has nothing to do with the question of whether Louisiana is a civil or common law jurisdiction. For considerably more than a hundred years Louisiana has been regarded as a civil law jurisdiction because of its adoption of the doctrines of the great branch of the private law of continental Europe. It remains today a civil law jurisdiction."<sup>26</sup>

Judge Pierre Crabites, who was well-known throughout this state a few years ago, wrote this:

"A Louisiana lawyer is no more of a civilian than a modern French police dog is a wolf. . . .

"It is, therefore, inaccurate for us to proclaim that Louisiana is a great civil law state. It is not. It may have been before the Civil War. We have been caught in the American maelstrom. The only salvage that remains is a Louisiana incrustation which has in it something of the Civil Law, and something of the Common Law, but which after all is an uncatalogued creation, but a viable institution because it typifies the composite genius of the soul of the true Louisianian."<sup>27</sup>

The Honorable Charles E. Fenner, late Justice of the Louisiana Supreme Court, expressed his feelings in these words:

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25. Ireland, *Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585 (1937). See also Greenberg, *Must Louisiana Resign to the Common Law?*, 11 TUL. L. REV. 598 (1937).

26. Daggett, Dainow, Hebert & McMahon, *A Reappraisal Reappraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12 (1937).

27. Crabites, *Louisiana Not a Civil Law State*, 9 LOYOLA L.J. 51-52 (1928).

"The adoption of the Napoleon Code was undoubtedly one of the most epoch-making events that has happened in human history."<sup>28</sup>

"Fortunate! Thrice fortunate, Louisiana, that when she came to frame her system of laws she found this incomparable Democratic model ready to her hand, and that by reason of the fact that at that period the majority of her people were of French descent they had the will and the power to adopt it."<sup>29</sup>

"I make bold to say that if our sister states had adopted these institutions when Louisiana did, our Republic would have been free, or at least comparatively free, from some of the greatest perils which to-day menace its existence."<sup>30</sup>

The late Chief Justice Merrick of the Louisiana Supreme Court, in addressing the New Orleans Academy of Science in 1871, said:

"To those who would like to see the body of the common law introduced among us, we say: What have you of value in the common law? The trial by jury, the habeas corpus, known and defined crimes and offenses, and enlightened rules of evidence? We have it all here, and more. Your criminal law is ours; your commercial law also is ours. But we have, also, the most admirable provisions of the civil law, filled with benevolence, equity and justice, to regulate our dealings and define our rights in our every-day life. That our laws, like all others, may require amendments to make them more perfect, none will deny. Let us amend, but never change them for others, of which our people have no experience, and the adoption of which promises us no advantages in the future."<sup>31</sup>

And, finally, George A. Pope, in an article published in the *George Washington Law Review*, expressed this opinion:

"During the past few years, writers have debated whether Louisiana is secure in her heritage as a civil law jurisdiction,

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28. Fenner, *The Civil Code of Louisiana as a Democratic Institution*, 1904 LA. B.A. REP. 7, 17.

29. *Id.* at 19.

30. *Id.* at 20.

31. Merrick, *The Laws of Louisiana and Their Sources*, 3 ALBANY L.J. 268, 275 (1871).



or whether 'it must be admitted that Louisiana is today a common law state.' A study of both sides of this argument reveals that neither contention is wholly correct, and, that, in any event, the question of whether Louisiana is a civil or common law state is somewhat academic.<sup>32</sup>

" . . . .

" . . . while Louisiana has not adopted the common law doctrine of *stare decisis*, there is considerable evidence that the courts of the other states have been influenced by the civil law doctrine of *jurisprudence constante*.<sup>33</sup>

" . . . .

"The conclusion must be that both systems are developing together into a new system of law that is neither common law nor civil law, but "American Law."<sup>34</sup>

It is true that in Louisiana the criminal law, the commercial law, and the laws of evidence are based on the common law of England. It is also true, however, that most of our basic laws relating to *persons, property, and obligations* were taken directly from the French Civil Code.

Louisiana unquestionably has developed its own legal system which is *sui generis*. But, if Louisiana must be placed in one of these two categories — civil law or common law — then there are three circumstances which I submit would compel us to classify this state as a *civil law jurisdiction*.

First, one of the basic and principal differences between civil law and common law is that civil law embraces the theory of *jurisprudence constante*, while the common law adopts the rule of *stare decisis*. In Louisiana, the civil law theory of *jurisprudence constante* has been firmly established, and the common law rule of *stare decisis* has been rejected.

Second, most of the legal principles found in our law relating to persons, property and obligations were taken directly from the French Civil Code, and indirectly from the laws of Spain and Rome, and they differ greatly from related principles found in common law jurisdictions. Louisiana law, there-

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32. Note, 17 GEO. WASH. L. REV. 186 (1948).

33. *Id.* at 192.

34. *Id.* at 198.

fore, is inseparably connected with French, Spanish, and Roman civil law.

And, finally, since our Civil Code is based on the Code Napoleon, our research for interpretation must go to French, Roman, and Spanish authorities, rather than to English sources.

The Honorable Robert L. Henry, Judge of Mixed Tribunals in Alexandria, Egypt, wrote, 30 years ago, that:

"The doctrines of Jurisprudence Constante in the Civil Law and of Stare Decisis in the Common Law look much alike, but the difference between them is such that it is one of the chief things which distinguishes the two great systems of the law.<sup>35</sup>

". . . .

"The Civil Law may be likened to a tree in winter. The trunk, limbs, and branches are the principles laid down in the codes. Some twigs are added by the doctrine of jurisprudence constante. The Common Law is like a tree in summer. The leaves represent the cases. They are so numerous and confused in pattern that no branches or limbs of any kind can be seen, or traced with certainty."<sup>36</sup>

More than 150 years ago Louisiana encountered a crossroad. One route led to a legal system based on common law and the other to a system based on civil law. An important, and I think wise, decision was made in selecting the latter route. This truly was an important crossroad in Louisiana history.

The leadership provided by Edward Livingston in determining the choice of the route which we would pursue recalls to my mind, as it did to Eugene Smith, this eloquent passage from Macaulay:

"The highest intellects, like the tops of mountains, are the first to catch and to reflect the dawn. They are bright, while the level below is still in darkness. But soon the light, which at first illuminated only the loftiest eminences, descends on the plain and penetrates to the deepest valley. First came hints, then fragments of systems, then defective systems,

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35. Henry, *Jurisprudence Constante and Stare Decisis Contrasted*, 15 A.B.A.J. 11 (1929).

36. *Id.* at 13.

then complete and harmonious systems. The sound opinion, held for a time by one bold speculator, becomes (first) the opinion of a small minority, (then) of a strong minority, (and finally) of a majority of mankind."<sup>37</sup>

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37. Smith, *Edward Livingston, and the Louisiana Codes*, 2 COLUM. L. REV. 24, 36 (1902).